Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

January 2009

Statute of limitations is equitably tolled while plaintiff pursues internal administrative remedy. In *McDonald v. Antelope Valley Community District* (Cal.Supr.Ct.; October 27, 2008) (Case No. S153964) [2008 DJDAR 16233], the trial court held that plaintiff's cause of action for racial discrimination and related claims was barred by the one-year statute of limitations for filing a complaint with the Department of Fair Employment and Housing. Plaintiff had filed the complaint after she voluntary pursued an internal administrative remedy. The Court of Appeal reversed and the California Supreme Court granted review. The Supreme Court affirmed the decision of the Court of Appeal, holding that, where plaintiff is required to exhaust administrative remedy before filing suit, statute of limitations is equitably tolled.

60-day appeal period requires mailing of notice; e-mail does not trigger the time limit. In *Citizens for Civic Accountability v. Town of Danville* (Cal.App. First Dist., Div. 5; October 27, 2008) 167 Cal.App.4th 1158, [84 Cal.Rptr.3d 684], the trial court ordered electronic filing and service in a complex case. After the court denied plaintiff's petition, the clerk so advised the parties via e-mail on the same day. Petitioners filed a notice of appeal more than 60 days later. Respondent moved to dismiss the appeal as untimely. The Court of Appeal denied the motion, holding, that the statute required the notice to be mailed to trigger the 60 day period. Service by e-mail did not constitute "mailing."

Permitting destruction of files results in dismissal of action. In an action for legal malpractice, defendant delivered 36 file boxes containing his entire file to plaintiff. Plaintiff placed them in a storage unit but failed to make rental payments and the storage facility destroyed the boxes. The trial court dismissed the action as a discovery sanction. The Court of Appeal affirmed. *Williams v. Russ* (Cal.App. Second Dist., Div. 8; October 27, 2008) 167 Cal.App.4th 1215, [84 Cal.Rptr.3d 813, 2008 DJDAR 16285].

Party who interpleads funds is not liable for conversion. Where lawyers, subject to competing claims to funds, interplead the funds, they cannot be liable for conversion based on claims by some of the contenders that the funds should have been turned over to them. The trial court properly sustained a demurrer to the conversion cause of action. *Shopoff & Cavallo v. Hyon* (Cal.App. First Dist., Div. 1; October 31, 2008) 167 Cal.App.4th 1489, [2008 DJDAR 16475].

Attorney's settlement does not preclude State Bar subrogation rights. After attorney Statile was sued by a client for misappropriation of trust funds, he settled for less than the amount lost by the trust. In the settlement agreement, the clients reserved their right to seek further reimbursement from the State Bar's Client Security Fund. The clients then applied for reimbursement of these additional losses to the fund. The fund reimbursed them and then sued Statile under its subrogation rights. The trial court agreed with Statile that the settlement precluded the subrogation claim. The Court of Appeal reversed. Under *Bus. & Prof. Code* §6140.5, the State Bar is entitled to subrogation after it has paid the client because of the lawyer's dishonest conduct and the settlement did not limit its rights. *State Bar of California v. Statile* (Cal.App. First Dist., Div. 4; November 20, 2008) 168 Cal.App.4th 650, [2008 DJDAR 17285].

No attorney fees if case is dismissed. *Civ. Code* §1717 provides for attorney fee awards where a contract so provides. But, the statute also provides that if the case is dismissed, there is no prevailing party. Thus, no fee award. This is true even where plaintiff files a dismissal with prejudice after the trial has already started. *Glencoe v. Neue Sentimental Film, AG* (Cal.App. Second Dist., Div. 4; November 25, 2008) 168

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.

Cal.App.4th 874, [2008 DJDAR 17457].

Sanction for ex parte communication with judge is reversed. When defense counsel failed to appear, the Deputy District Attorney sent a note to the judge stating counsel had been suspended. The court sanctioned her under *Code Civ. Proc.* §177.5 for communicating ex parte with the court. The Court of Appeal reversed. Section 177.5 only authorizes the imposition of monetary sanctions for a violation of a court order. Here there was no order. Also, the statute provides for notice and hearing and a written order detailing the conduct being sanctioned. None of that was done. *People v. Hundal* (Cal.App. Third Dist.; November 25, 2008) 168 Cal.App.4th 965, [2008 DJDAR 17451].

Your meal is "hot" whether or not it has been sitting around for hours after cooking. *Pen. Code* §5058 requires the Department of Corrections and Rehabilitation to furnish prisoners with three meals each day, "two of which are to be served hot." But, the Court of Appeal held that this only means the meals must have been heated at some time before they were served. It did not matter that the prisoners may not get the food until it had been around for quite some time. *In re Cannon* (Cal.App. First Dist., Div. 1; November 25, 2008) 168 Cal.App.4th 910, [2008 DJDAR 17479].

Appellate court imposes sanctions for failure to notify it of settlement. Days before a case was scheduled for oral argument, one of the attorneys notified the court that the case had been settled almost a year earlier. Considering the amount of work that went into the court's preparation for oral argument, the court was not pleased. It noted that C*al. Rules of Court*, rule 8.244 requires an appellant who has settled to immediately serve and file a notice of settlement, the court sanctioned appellant's counsel personally in the sum of $6,000 and ordered that a copy of the opinion be sent to the State Bar. *Huschke v. Slater* (Cal.App. First Dist., Div. 2; December 2, 2008) 168 Cal.App.4th 1153, [2008 DJDAR 17687].

Court lacks authority to shorten time for summary judgment. *Code Civ. Proc.* §437c requires summary judgment motions to be served 75 days before hearing. (80 days if mailed.) In *Robinson v. Woods* (Cal.App. Second Dist., Div. 1; December 4, 2008) 168 Cal.App.4th 1258, [2008 DJDAR 17783], defendant mailed the notice 76 days before the hearing. The hearing was also noticed within the "30 days before trial" required by the statute. The trial court continued the hearing for four days, found "good cause" for hearing the motion within the 30 day cut-off period, and granted the motion. The Court of Appeal reversed. The court did not have authority to cure the defendant's failure to provide the time required by the statute by continuing the hearing. The notice of motion was invalid and should be denied on that ground.

Guilty plea set aside where court failed to advise defendant of immigration consequences. Where the record was unclear whether the court advised a foreign born defendant of the potential for deportation at the time he accepted his guilty plea, the plea is to be set aside, as long as defendant can show that it is reasonably probable he would not have pleaded guilty had he known of the potential immigration consequences. *People v. Akhile* (Cal.App. First Dist., Div. 5; October 9, 2008) 167 Cal.App.4th 558, [2008 DJDAR 15654].